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Supreme Court of the United States

OCTOBER TERM, 1990

JEFFREY M. MASSON,

Petitioner,

v.

THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and
JANET MALCOLM,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF *AMICI CURIAE* OF HOME BOX OFFICE, INC., BUENA VISTA PICTURES DISTRIBUTION, INC., COLUMBIA PICTURES ENTERTAINMENT, INC., ORION PICTURES CORPORATION, PARAMOUNT PICTURES CORPORATION, AND TWENTIETH CENTURY FOX FILM CORPORATION IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE*

STATEMENT OF INTEREST

This Brief [1] is submitted on behalf of Home Box Office, Inc. (referred to as "HBO"), and Buena Vista Pictures Distribution, Inc., Columbia Pictures Entertainment, Inc., Orion Pictures Corporation, Paramount Pictures Corporation, and Twentieth Century Fox Film Corporation (collectively referred to as the "Motion Picture Amici").

HBO provides television programming to subscribing viewers throughout the United States. HBO telecasts motion pictures over two pay television services (HBO and Cinemax) and exhibits many works produced by the Motion Picture Amici, as well as dramatic programs produced by or specifically for HBO.[2] The Motion Picture Amici produce, or finance production of, motion pictures which they distribute for exhibition throughout the world.[3] In addition, some of the Motion Picture Amici produce or finance production of movies and dramatic programs created solely for television.

This case is of enormous significance to the Amici. Scores of movies over the years, many produced and distributed by the Motion Picture Amici and HBO or telecast by HBO, have blended fact and fiction. These movies and programs, often referred to as docudramas, are based on current or recent events of public interest and include portrayals of both famous and infamous people.[4]

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[1] Written consent of both parties has been filed with the Clerk of the Court, as required by Rule 37.3.

[2] In this Brief, HBO and the Motion Picture Amici will generally be referred to as Amici.

[3] The only exception to this is Buena Vista Pictures Distribution, Inc., which does not produce or finance production of motion pictures, but distributes the motion pictures of other producers, including Walt Disney Pictures and Television, Touchstone Pictures, and Hollywood Pictures.

[4] Many of the motion pictures and dramatic television programs that fall within this genre and were produced by Amici are iden-

Invented quotations are essential to docudramas. In dramatic exposition, conversations cannot be reconstructed with stenographic accuracy and authors of docudramas must create conversations for the real people portrayed. Actual conversations often are compressed to fit within the limited time-frame of a movie or to produce greater artistic impact without the intrusion of a narrator.

The strong interest of Amici arises from petitioner's request for a broad rule requiring verbatim quotation at the peril of defamation actions. A verbatim quotation rule would strike at the core of the docudrama genre; the very nature of docudramas requires literary license to invent dialogue. This Court should reject petitioner's invitation to expand defamation law outside the scope required to protect any legitimate State interest and affirm the judgment of the Court of Appeals.

SUMMARY OF ARGUMENT

Libel law historically has been concerned with loss to reputation, not the presence of inaccurate quotations as an allegedly independent harm. Following this tradition, the Court of Appeals carefully applied existing defamation law and concluded that, where the substance conveyed by the alleged misquotation was accurate, the mere allegation of alteration or fabrication of the plaintiff's words did not in itself create an actionable defamation claim.

Petitioner now urges this Court to promulgate a broad rule requiring verbatim quotation. Petitioner offers a talisman—the apparent misuse of quotation marks—to prove *both* defamatory falsehood and actual malice. Under this theory, courts no longer would address the central interest in redressing harm to reputation. Rather, they would substitute a mechanical test in place of search-

tified below. Numerous motion pictures and dramatic programs that were produced by entities other than Amici are also discussed below.

ing review of evidence proffered to meet the constitutional burden of proving falsity and actual malice.[5]

Amici believe that petitioner's proposed rule would reach far beyond the facts of this case, add more confusion to litigation concerning docudramas, and substantially narrow the scope of creativity and expression protected by the First Amendment.[6] The rule could strip many publications of First Amendment protection, yet it is not designed to promote the States' legitimate interest in preserving individual reputation.

For these reasons, and the reasons set forth below, the Amici respectfully request that the decision of the Court of Appeals be affirmed.

ARGUMENT

I. THE AMICI PRODUCE AND DISTRIBUTE MANY WORKS WITH INVENTED DIALOGUES AND SCENES.

A. Docudramas Express Ideas and Educate the Public.

Nearly forty years ago, this Court recognized that movies are a vital creative and educational medium.

> They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. . . . [T]hey are designed to entertain as well as to inform.

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 501 (1952).

[5] *Hustler Magazine v. Falwell*, 485 U.S. 46, 55 (1988); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

[6] Petitioner claims that he does not seek to impose the rule on docudramas or works where the reader "knows" quotations are not verbatim. But this position presumes that such "knowledge" is always self-evident on the face of a work or that a disclaimer that a work is "fictionalized" will automatically protect speech. The troubled history of defamation litigation against works drawing on real people and events to portray greater truths demonstrates that even a warning of fictionalization will not insulate the creative and expressive process from attacks under state defamation law.

Motion pictures cover a broad range of subjects. In some, history serves as a backdrop for fictional characters. Others, in the manner of a *roman à clef*, are disguised renderings of real people and events. *See Time, Inc. v. Hill*, 385 U.S. 374, 376-78 (1967).[7] Still others recreate—without disguise—real and frequently still-living subjects, in the form of docudrama. *See, e.g., Davis v. Costa-Gavras*, 654 F. Supp. 653, 658 (S.D.N.Y. 1987).[8]

Docudramas serve a different purpose than documentaries. "A documentary is a non-fictional story or series of historical events portrayed in their actual location; a film of real people and real events as they occur. A documentary maintains strict fidelity to fact." *Id.* at 658. At the opposite extreme from documentaries, completely fictional and imaginary works have no foundation in actual events or real people's lives.[9]

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[7] One well-known example is Orson Welles' *Citizen Kane*, based on the life of William Randolph Hearst. Though "primarily a study of the private life of a public figure, it is political in its obsession with power." T. Christensen, *Reel Politics* 59 (1987); *see also* Note, *Welcome to the Nineties Bindrim v. Mitchell: Now Drop Dead*, 12 Hastings Comm./Ent. L.J. 517, 522-23 (1990) (discussing the parallels between Hearst and the fictional Kane).

[8] Film scholars disagree on an exact definition of docudrama. One study categorized "nine variations of docudrama 'ranging from the "pure" form based on investigatory and trial records recreating events in the lives of actual persons . . . to programs utilizing historical personages or themes which include some fictionalization.'" Feldman, *Footnote to Fact: The Docudrama*, in *Film Genre Reader* 346 (B. Grant ed. 1986) (quoting Hoffer & Nelson, *Docudrama on American Television*, in 30 *Journal of the University Film Association* no. 2 (Spring 1978)). For purposes of this Brief, Amici refer primarily to docudramas that recreate actual events in the lives of real persons. But, as is illustrated in the cases discussed below, the broad sweep of a verbatim quotation rule could reach well beyond "pure" docudramas and impact even purely fictional films.

[9] Law also utilizes fiction to serve its purposes. "A fiction in the law is indeed a fiction. It is something made up. If there is correspondence to the facts, that is coincidence. The fiction may, of course, be true in a nonliteral sense." C. Rembar, *The Law of the Land* 208 (1980). Fictions "are to be praised when skillfully used." J. Gray, *The Nature and Sources of the Law* 37 (1931).

Positioned between fictional movies and factual documentaries, docudramas blend fact and fiction in an attempt to capture essential truths about persons and events without verbatim recreation. Actors and actresses portray people who are the subject of the movie, speak fictionalized dialogue, and the director or screenwriter may telescope multiple events or create composite characters for dramatic effect. "Self-evidently a docudrama partakes of author's license—it is a creative interpretation of reality." *Id.* at 658.[10] Creative interpretation through docudrama would be impossible if deviation from verbatim quotation were itself an independent basis for assessing defamation liability.

B. A Wide Range of Award-Winning Docudramas Tell the Underlying Truth Without Duplicating Actual Events.

Numerous movies, many of which were produced or distributed by Amici or telecast by HBO, and many of which have won the highest awards in the industry, portray living public figures and address issues of political

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[10] Petitioner suggests that he has no intention of implicating "docudramas, memoirs, reviews or other publications where the reader is told the quotes are not verbatim." Brief for Petitioner at 26. But given petitioner's criticism of "extending constitutional protection to deliberately altered and manufactured quotations," *id.* at 22, and his approving analysis, *id.* at 23, 24 of *Bindrim v. California*, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *cert. denied*, 444 U.S. 984 (1979), *disapproved in McCoy v. Hearst Corp.*, 42 Cal. 3d 835, 847 n.9, 727 P. 2d 711, 719 n.9, 231 Cal. Rptr. 518, 525 n.9 (1986), *cert. denied*, 481 U.S. 1041 (1987), a case involving a defamation action brought against a work of fiction, this suggestion is disingenuous. Indeed, the amicus brief of The Mountain States Legal Foundation in support of petitioner asserts that there "is no exception" allowed for fictionalizing quotations, unless, perhaps, the speaker is deceased. *See* Amicus Brief of The Mountain States Legal Foundation at 14-15.

and social importance without exact replication of history. A few examples of the many listed below illustrate the kind of docudramas that could be at risk under a per se misquotation rule.

All the President's Men[11] tells the Watergate story from the viewpoint of reporters for The Washington Post.[12] *The Right Stuff*[13] recreates the early days of NASA with its failures and successes, with actors portraying, among others, astronaut John Glenn, now a United States Senator, and the late President Lyndon B. Johnson. *The Killing Fields* is based on the escape from Cambodia and the Khmer Rouge regime by Dith Pran, the Cambodian assistant to The New York Times' war correspondent Sydney Schanberg. Each of these docudramas recreates actual events in the lives of real people, with actors and actresses portraying real, and often still living people, and these portrayals employ invented dialogue that seeks not mindless duplication, but rather the essence of character and life.[14] Many of HBO's

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[11] Based on the book by Carl Bernstein and Robert Woodward and telecast by HBO. Screenwriter William Goldman won an Academy Award for his script.

[12] Many believe that this movie had significant political repercussions. For example, the film's screenwriter, William Goldman has asserted that by resurrecting the Watergate issues during the 1976 presidential election year, this movie helped elect Jimmy Carter to the presidency. *See* T. Christensen, *supra* n.7, at 136.

[13] Based on the book by Tom Wolfe and telecast by HBO.

[14] Scores of other docudramas telecast by HBO also dramatically recreate stories of real people and events, both current and historic. These include *Silkwood*, the story of Karen Silkwood, her work in a nuclear facility, and her mysterious death while driving to meet a news reporter to discuss the facility; *A Cry in the Dark*, a recreation of the events surrounding and the trial of Lindy Chamberlin based on the disappearance of her baby; *Scandal*, which retells the story of the indiscretions of Britain's Secretary of State for War John Profumo with Christine Keeler and his resulting expulsion from government; and *My Left Foot*, which portrays Christy Brown, who overcame severe physical disabilities from cerebral palsy to become a painter. These movies may inspire,

award-winning dramatic programs are also docudramas that draw from current or recent events.[15]

All of these works serve at least the functions of education and entertainment.[16] But they cannot tell their story without the liberty to imagine dialogue and create conversations for real people.[17]

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educate, inform, and entertain, even though they do not exactly mimic factual events; and particularly because each movie characterizes living persons, each would be threatened by petitioner's proposed rule.

[15] HBO's *Mandela* traces Nelson Mandela's struggle through the African National Congress, his trial for high treason, and imprisonment after 1962. In *Conspiracy: The Trial of the Chicago 8*, HBO recreated the trial of the alleged participants in the riots that accompanied the 1968 Democratic Convention. *Murderers Among Us: The Simon Wiesenthal Story* won Ace Awards for Best Movie and Best Director. HBO's *Tailspin: Behind the Korean Airliner-Tragedy* reconstructs the shooting down of KAL 007 and the behind-the-scenes drama of reactions of various United States governmental departments. In a biographical vein, HBO's *Murrow* chronicles the legendary newscaster, Edward R. Murrow.

[16] Some docudramas are closer in format and informational content to news programs, dramatizing stories as they happened at the time. Others are closer to "pure" fiction, recreating significant events using only a historical backdrop and a more extensive use of literary license. *See* Feldman, *supra* n.8, at 346. Yet each format seeks to capture some essence of the human condition and each is equally threatened by litigation if petitioner's argument is adopted.

[17] As a practical matter, producers sometimes may secure liability releases from some of the individuals who will be portrayed in a docudrama. Sometimes, however, such individuals cannot be located years after the event—until they suddenly surface as libel plaintiffs. In *Judge Horton and the Scottsboro Boys* (1976), NBC recreated the story of the prosecution of nine black men for an alleged rape, which resulted in several significant decisions by this Court: *Powell v. Alabama*, 287 U.S. 45 (1932), *Norris v. Alabama*, 294 U.S. 587 (1935), and *Patterson v. Alabama*, 294 U.S. 600 (1935). NBC concluded that the complainant was no longer alive. After the first broadcast, she sued for defamation and invasion of privacy. *See Street v. National Broadcasting Co.*, 645 F.2d 1227 (6th Cir.), *cert. dismissed*, 454 U.S. 1095 (1981). Releases present

C. Docudramas Spring From a Long Literary and Theatrical Tradition and Portray a Wide Variety of People and Issues.

Inventing dialogue and events, of course, is not a creation of the twentieth century, but extends back at least to Plato. *The Apology* purports to portray Socrates' unsuccessful defense argument at his trial—"not, of course, a stenographic report, but what remained in Plato's memory some years after the event, put together and elaborated with literary art." B. Russell, *A History of Western Philosophy* 84 (1945). Indeed, Plato's most important dialogues in *The Republic* claimed Socrates as the protagonist, yet the dialogues were not verbatim, if indeed any of *The Republic* actually quoted Socrates. *See id.*[18]

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other problems. For example, the producer may not know who, among many prospective characters, fictional and semi-fictional, will require or demand a release. Furthermore, the person from whom the release is sought may decide to extract changes in the script to promote personal whims or ideology or may simply refuse to sign at any price. More importantly for this appeal, the possibility of paying money and obtaining a release does not answer the major First Amendment questions presented by petitioner's proposed rule.

[18] Thucydides created quotations of his contemporaries even though he could have recorded the words of many of the speakers. "[M]y method has been, while keeping as closely as possible *to the general sense of the words that were actually used*, to make the speakers say what, in my opinion, was called for by each situation." Thucydides, *The Peloponnesian War* 24 (R. Warner trans. 1954) (emphasis added).

Modern investigative reporters have done the same. Nicholas Gage, a former reporter for The New York Times who researched and wrote of his mother's execution by Greek communists in 1948, quoted Thucydides when he observed that in his book he "' put into the mouth of each speaker the sentiments proper to the occasion, expressed as I thought he would be likely to express then.'" N. Gage, *Eleni* 471 (1983). The book was later made into a movie, *Eleni* (1985), which recreated Gage's efforts at researching the story, and depicted his mother and the people and events surrounding her execution.

History as portrayed through drama was one of Shakespeare's favorite formats,[19] and his English Histories alone comprise over a quarter of the Bard's canon. The *Henry VI* plays were written and first performed in 1598 and " 'there is no certain evidence that any popular dramatist before Shakespeare wrote a play based on English history.' . . . If he did not originate the form of the History Play, when he wrote the Henry VI plays, he created its vogue and shaped its tradition." R. Ornstein, *A Kingdom for a Stage* 6 (1972) (quoting F. Wilson, *Marlowe and the Early Shakespeare* 106 (1952)). The characters in Shakespeare's Histories spoke with invented quotations, but captured the essence of historical events with a beauty and clarity rarely found in life.[20]

Not surprisingly, fictional histories have played a substantial role in American literature. Many of these histories relied on invented (or dubiously reconstructed) dialogue. Indeed, Parson Weems' tale in his "biography" of George Washington established one of the Nation's most enduring myths—young George chops down a cherry tree and then admits his guilt, "I can't tell a lie, Pa." *See* M. Weems, *Life of Washington*, xxii-xxiii (M. Cunliffe ed. 1962). Although this story may be discredited as a fictional tale, *id.*,[21] not a factual account,[22] it

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[19] "Shakespeare knew that tradition supplies a better fable than any invention can." R. Emerson, *Shakespeare; Or The Poet*, in *Essays and Lectures* 713 (1983).

[20] One guesses that Henry V spoke more humbly and less coherently at Harfleur than when Shakespeare had him say "Once more unto the breach, dear friends, once more; Or close the wall up with our English dead." *Henry V*, Act III, sc. i.

[21] "At last, after a century and a quarter, the rubbish has been mostly cleared away, and only those who willfully prefer to deceive themselves need waste time over an imaginary Father of His Country amusing himself with a fictitious cherry tree and a hatchet." *Id.* (quoting Thayer, *George Washington* vii (1922)).

[22] Young Washington's "quote" may be among this nation's most famous fictionalized quotations, but its underlying "truth" highlights a critical question for defamation cases. This Court has fre-

remains true in a larger sense as a portrayal of Washington's character.

Other early American examples of docudramas with invented or fabricated quotations include Henry Wadsworth Longfellow's *Paul Revere's Ride* and Washington Irving's *Knickerbocker's History of New York.*[23] In the latter, which was first published in 1809, Irving used his satiric "history" to attack contemporary American politicians. "The symbol of Irving's America and focal point of his displeasure . . . is Thomas Jefferson's administration of 1801 to 1809. Early republicans had little trouble in recognizing their third president in the figure of William the Testy." R. Ferguson, *Law and Letters in American Culture* 157 (1984) (footnote omitted).[24]

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quently observed that "'there is no constitutional value in false statements of fact.'" *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974)). And the substance of petitioner's appeal is that inaccurate quotation should be deemed automatically a false statement of fact. Yet, Parson Weems' tale of young Washington, though literally "false" in one sense, has helped shape national aspirations and conceptions of leadership, and has provided a strong moral example for youth. Here, one must ask whether the facts or the myth more truly portray the essence of George Washington's integrity and whether the facts or myth are more or less deserving of constitutional protection.

[23] Irving later poked fun at his fictionalizing in the work:

> [N]either did I conceive I was committing any grievous historical sin in helping out the few facts I could collect in this remote and forgotten region with figments of my own brain, or in giving characteristic attributes to the few names connected with it which I might dig up from oblivion.

W. Irving, *Knickerbocker's History of New York*, Author's Apology at 2 (New York Century Co. ed. 1910).

[24] Although identifiable, the depiction also was inexact. According to Jefferson's biographer Dumas Malone, William was small, impatient, and had violent outbursts of temper. "Jefferson did not look like that and [was not] passionate and unreasonable. . . . Nevertheless, along with some wide misses, the young author also made some palpable hits." D. Malone, *Jefferson and His Time, The Sage of Monticello* 26 (1981).

Producers of motion pictures naturally adopted the literary and theatrical devices of invention, drama, and imagined dialogue of historical or living people. Motion picture docudramas thus have covered a wide range of American life, and dramatize and explain significant public events, politicians, and public figures.[25] Even the events surrounding and the repercussions of decisions of this Court have been dramatized.[26] Cases in other courts have inspired powerful docudramas that recreate the events and important trials of numerous people [27] on a vari-

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[25] Given the sheer volume of movies that have been produced over the years, the docudramas in this Brief are a representative sample, not a comprehensive listing.

[26] *Gideon's Trumpet* (1980), starring Henry Fonda as Clarence Gideon and Jose Ferrer as Abe Fortas (prior to his appointment to the Supreme Court) dramatized Florida's prosecution of Gideon, which led to this Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The events and people of *Roe v. Wade*, 410 U.S. 113 (1973), were recently dramatized in a television docudrama called *Roe v. Wade* (1989) and telecast on the NBC television network. A new docudrama called *Separate But Equal*, tells the story of *Brown v. Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955). Sidney Poitier portrays the NAACP attorney, now Supreme Court Justice, Thurgood Marshall and the film will be telecast in the near future on the ABC television network. The lives of great jurists have also been portrayed in docudramas such as *The Magnificent Yankee* (1950) based on the life of Oliver Wendell Holmes.

[27] *I Want to Live!* (1958) raised questions about capital punishment by recreating the events surrounding a homicide, and the prosecution and execution on June 3, 1955 of a 32-year-old woman named Barbara Graham for the crime. T. Harris, *Courtroom's Finest Hour In American Cinema* Introduction at xii and 38-39 (1987). *Inherit the Wind* (1960) recreated the Scopes trial with Spencer Tracy portraying Clarence Darrow and Gene Kelly portraying a cynical reporter modeled on H.L. Mencken. T. Harris, *supra*, Introduction at xii and 110-14. *Judgment at Nuremberg* (1961) telescoped the historical Nuremberg war crimes trials of twenty-two defendants into a quartet of four defendants. T. Harris, *supra*, Introduction at xii and 129-31.

ety of issues. Political events,[28] as well as political leaders and their careers,[29] and military leaders[30] and campaigns,[31] all have been captured in docudramas. Nor

[28] As noted, *All The President's Men* (1976) recreates the Watergate story. *Missing* (1982), which won an Academy Award for best screenplay, tells of American Charles Horman's disappearance and murder in Chile during the coup that overthrew the Allende government. *Mississippi Burning* (1988) dramatizes the FBI investigation of the murders of three civil rights workers in Mississippi in 1964. *Blood Feud* (1983) chronicles Teamster Union leader Jimmy Hoffa's lengthy battles with Robert Kennedy. *Born on The Fourth of July* (1989) recreates the events at war and the return home of Vietnam veteran Ron Kovic. *Collision Course* (1975), a television docudrama, reconstructs the events surrounding General MacArthur and President Truman's clash over ending the Korean War. *Cry Freedom* (1987) is a film of South African Steven Biko's struggle against apartheid in South Africa. *Tail Gunner Joe* (1977) is a television movie chronicling the life and career of Senator Joseph McCarthy. *See generally Cohn v. National Broadcasting Co.*, 3 Med. L. Rptr. 1999 (N.Y. Sup. Ct. 1978), *modified*, 67 App. Div. 2d 140, 414 N.Y.S.2d 906 (1979), *aff'd*, 50 N.Y. 2d 885, 430 N.Y.S.2d 265, 408 N.E.2d 672, *cert. denied*, 449 U.S. 1022 (1980), which involved a defamation and invasion of privacy action brought by the late Roy Cohn.

[29] *All The King's Men* (1949) (Huey Long); *Eleanor and Franklin* (1976 and 1977); *Blaze* (1989) (Louisiana Governor Earl Long); *Che!* (1969) (Che Guevara); *Wilson* (1944) (Woodrow Wilson); *Mussolini: The Decline and Fall of Il Duce* (1985); *Give 'em Hell Harry* (1975) (Harry Truman); *Gandhi* (1982); *LBJ: The Early Years* (1987).

[30] *Patton* (1970); *MacArthur* (1977); *Lawrence of Arabia* (1962) (T.E. Lawrence); *PT-109* (1963) (John F. Kennedy); *The Desert Fox* (1951) (Field Marshall Rommel); *The Desert Rats* (1953) (Field Marshall Rommel).

[31] *The Longest Day* (1962) retells the story of D-Day, the Allied invasion of Normandy. *The Bridge On The River Kwai* (1957) won several Academy Awards, including best screenplay for this true story of British prisoners of war in a Japanese prison camp. *Tora! Tora! Tora!* (1970) chronicles the Japanese attack on Pearl Harbor from both the American and Japanese viewpoints. *Fat Man and Little Boy* (1989) tells about Robert Oppenheimer and General Groves and the development of the atomic bomb during World War II. *The Great Escape* (1963) recreates the story of an attempted escape of allied prisoners of war from a German prison camp during World War II.

have sports figures,[32] entertainers,[33] or people who helped shape our understanding of the world in more humble ways, been less frequent subjects.[34]

[32] *Chariots of Fire* (1981) (on the 1924 Olympic athletes Eric Liddell and Harold Abrahams and winner of Academy Awards for Best Screenplay and Best Picture); *Raging Bull* (1980) (prize fighter Jake LaMotta); *The Jesse Owens Story* (1984); *The Babe Ruth Story* (1948); *Babe* (1975) (Babe Dedrickson Zaharias); *Heart Like A Wheel* (1983) (race car driver Shirley Muldowney); *The Bob Mathias Story* (1954); *Brian's Song* (1970) (portraying Brian Piccolo and Gayle Sayres of the Chicago Bears); *Knute Rockne, All American* (1940) (in which Ronald Reagan portrays football star George Gipp under the tutelage of Notre Dame's legendary coach).

[33] *Coal Miner's Daughter* (1980) (Loretta Lynn); *Lenny* (1974) (Lenny Bruce); *Sweet Dreams* (1985) (Patsy Cline); *La Bamba* (1987) (Ritchie Valens); *The Benny Goodman Story* (1955); *Louis Armstrong—Chicago Style* (1976); *The Buddy Holly Story* (1978); *Great Balls of Fire* (1989) (Jerry Lee Lewis); *Bound For Glory* (1976) (Woody Guthrie).

[34] *White Hunter, Black Heart* (1990) is a drama based on film director John Huston. *Reversal of Fortune* (1990) portrays the lives of Claus and Sonny Von Bulow and Claus Von Bulow's trial for attempted murder. *Stand and Deliver* (1987) tells the story of Jaime Escalante who teaches mathematics and calculus to inner city students in Los Angeles. *The Ryan White Story* (1989) tells of a young hemophiliac who contracts AIDS. *Norma Rae* (1979) dramatizes the story of Crystal Lee Sutton, a labor organizer in the Southern textile industry. *Joe Hill* (1971) portrays labor leader Joe Hill. *Matewan* (1987) portrays the miners involved in a coal miner's strike in West Virginia. *Dog Day Afternoon* (1975) won an Academy Award for Best Screenplay for dramatizing the story of a Brooklyn man who robbed a bank to pay for his lover's sex change operation. *Midnight Express* (1978) also won an Academy Award for Best Screenplay for this story of American Billy Hayes' imprisonment in a Turkish prison for drug smuggling. *Birdman of Alcatraz* (1962) portrays Robert Stroud, a convict who became an ornithology expert while in prison. *The Spirit of St. Louis* (1957) recreates Lindberg's 1927 trans-Atlantic flight.

Some people are of such great interest that their story has been dramatized more than once. Helen Keller's life-story was

Docudramas that dramatize real people, events, and by necessity their conversations, have become a prominent art form in American culture with deep roots in the American literary and film tradition.[35] Without their varied, and often successful, attempts to capture the essence of events and people by metaphor, our cultural heritage would be far poorer and the search for truth protected by the First Amendment far less rich.

II. PETITIONER'S "RULE" WOULD FURTHER CLOUD THE ALREADY MURKY WATERS OF LITIGATION OVER DOCUDRAMAS AND OTHER FICTIONAL WORKS.

Docudramas, like many other creative works, are neither pure fact nor pure fiction. To the literal-minded, however, "fictionalization" equals falsity, and docudramas have become inviting targets for defamation plaintiffs and their lawyers. Courts thus have confronted the conundrum of applying defamation law (which has as its purpose the punishment of those who utter defamatory

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dramatized in two movies, one made in 1962 and the other in 1979, both called *The Miracle Worker*. The story recounted in Anne Frank's diary also has been filmed twice, once in 1959 and once in 1980. Both were called *The Diary of Anne Frank*.

[35] The docudrama format is by no means limited to films and books. Numerous theatrical plays also fall within the genre. Some of these are: *A Walk in the Woods* (a dramatization of arms negotiators Paul Nitze and Yuli Kyitsinsky's agreement on arms reduction during their walk in the Geneva woods); *Shadowlands* (on C.S. Lewis and Joy Davidson); *Execution of Justice* (the trial of Dan White for the murder of Harvey Milk and San Francisco Mayor George Moscone); *God's Country* (dramatization of the murder of Denver talk show host Alan Berg by members of a white supremacist group). Opera also has utilized the format, for example in *Nixon in China*, as have popular singers. Johnny Horton sings of the World War II hunt for the German battleship Bismark in *Sink the Bismark*, and quotes Winston Churchill as improbably saying: "Put every ship asail, *'cause* somewhere on that ocean, I know she's *gotta* be, we *gotta* sink the *Bismark* to the bottom of the sea." Johnny Horton, *Greatest Hits*, track 10, *Sink The Bismark* (emphasis added).

false facts)[36] to works that admittedly are comprised of both fiction and fact. Many cases illustrate the inevitable clash between the law's search for fact (and the occasionally elusive distinction between protected truth and actionable falsity) and the author's license for creative expression, in which fictional elements are often blended with stories based on real events.[37] In this confusing mixture, courts have criticized creative works for being both too fictional and not fictional enough.

Whether traditional defamation analysis makes sense when applied to such works need not be answered at this time by the Court.[38] Petitioner, however, broadly argues that "the Court has a duty to discourage the publication of false quotes," Brief for Petitioner at 19, and contends that the First Amendment should not protect any "deliberately altered and manufactured quotations." *Id* at 22. Despite his protestations to the contrary, petitioner offers no principled basis to limit this literalistic rule to jour-

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[36] *Philadelphia Newspapers v. Hepps*, 475 U.S. at 773-74 ("Any analysis must also take into account the 'legitimate state interest underlying the law of libel [in] the compensation of individuals for the harm inflicted on them by defamatory falsehood.'") (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)).

[37] George Herbert's caution, "[g]o not for every grief to the physician, nor for every quarrel to the lawyer, nor for every thirst to the pot," G. Herbert, *Jacula Prudentum* 290 (1651), seems apt for an area where legal analysis can easily misapprehend the creative work. The result has sometimes been akin to the outcome of those who literally interpreted the fictional work of Salmon Rushdie, *The Satanic Verses*, and condemned him to death for allegedly blashpheming Muhammad's wives by calling them prostitutes, when Rushdie wrote a brief fantasy of prostitutes who adopted the names of Muhammad's wives.

[38] Some have suggested that a test that presumes a distinction between true and false facts cannot rationally be applied to such works. *See generally*, Silver, *Libel, the "Higher Truths" of Art, and the First Amendment*, 126 U. Pa. L. Rev. 1065 (1978).

nalism while preserving other forms of expression from its application and its consequences.[39]

Adoption of petitioner's proposed constitutional rule would, in effect, create strict liability for creative writers who blend fact and fiction and who, in doing so, inevitably employ "altered or deliberately manufactured quotations."[40] This Court should avoid any such draconian result in reaching its decision here.

A. Cases About Docudramas Illustrate the Confusion Created by Literalistic Legal Analysis.

Docudramas, as well as filmed and written works of pure fiction, have been attacked through claims of defamation and invasion of privacy.[41] While these lawsuits are perhaps not surprising in our litigious times, the courts' analyses and results in the cases have been

[39] Indeed, petitioner's reliance on *Bindrim* belies his assurances that easy distinctions can be made between fiction, journalism, or creative blends of fiction and juornalism.

[40] The breadth of the language used in the dissent below also highlights the danger to docudramas: "what somebody says is a fact, and . . . doctoring a quotation is no more protected by the first amendment than is any other falsification." *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1562 (9th Cir. 1989) (Kozinski, J., dissenting). A docudrama writer knows the work he or she is writing is not, in its narrow, literal sense, "true." If the defamation plaintiff establishes that knowledge, then (the plaintiff will assert) "knowing falsehood" and thus actual malice has been proven as a matter of law. Even the majority opinion below could be broadly interpreted to foreclose constitutiona! protection for docudramas. "A factfinder may infer actual malice from a fabricated quotation when the language attributed to the plaintiff is wholly the product of the author's imagination." *Id.* at 1539.

[41] Other claims against docudramas also have been brought. *See, e.g., Hunt v. National Broadcasting Co.*, 872 F.2d 289 (9th Cir. 1989) (upholding denial of motion for prior restraint of television docudrama on crimes allegedly committed by Joe Hunt); *Goldblum v. National Broadcasting Corp.*, 584 F.2d 904 (9th Cir. 1979) (reversal of entry of prior restraint order that allowed the district court to review a docudrama, prior to broadcast, for "inaccuracies" that might be harmful to plaintiff).

varied and inconsistent[42] because of the difficulty in squaring a fact-based defamation test with the creative works and fictional characters that are challenged.[43] The cases divide on whether the work should be tested under traditional defamation "of and concerning" standards, whether the portrayal is substantially accurate, whether the story would be plausible to a reasonable reader or viewer, and whether fictionalization is equivalent to actual malice. As the decisions demonstrate, unpredictability is the common thread.

Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *supra*, a case in which the court mechanically applied defamation analysis to a fictional novel, typifies the problem.[44] In *Bindrim*, the plaintiff argued that the novelist's creation of a charcter named Hereford, who did not speak, look like, or have the same name or medical degree, was a false and defamatory depiction of him.[45] Be-

[42] *See generally* Franklin, *Fiction, Libel, and the First Amendment*, 51 Brooklyn L. Rev. 269 (1985). As Professor Franklin notes of the defamation cases against works purporting to be fiction, "courts are divided as to . . . the means of determining liability and . . . seem to be using inappropriate tools and distorting doctrine. . . . That kind of groping, suggestive of an underlying doubt, warrants the attention of the legal community." *Id.* at 272.

[43] *See* Silver, *supra* n.38, at 1067. Professor Silver analyzes defamation law in the context of the modern literary art form in novel writing of "faction." "One might describe the novel of 'faction' as one that adheres fairly closely to historical fact as a foundation for psychological speculation about—or 'mythologizing' of—the real persons and events it describes." *Id.* at 1067 n.10.

[44] *See* Wilson, *The Law of Libel and the Art of Fiction*, 44 Law & Contemp. Prob. 27, 30 (1981) ("*Bindrim v. Mitchell* is an example of the casuistry that results from the effort to apply the present constitutional law of libel to the art of fiction.").

[45] Motion pictures are subject to the additional risk that plaintiffs will contend they are identified by the physical appearance of the actors, though not in name. *See Bernstein v. National Broadcasting Co.*, 129 F. Supp. 817, 820 (D.D.C. 1955). *Bernstein* involved an invasion of privavy claim by a man convicted of murder and later pardoned. NBC telecast a docudrama of the story 12 years after

cause the author admittedly had drawn her book from a personal encounter with the plaintiff in a therapy session,[46] and despite the differences in physical characteristics, name, and speech used by the character and the plaintiff, the court affirmed a jury finding that the plaintiff was the character Hereford. The court held that there was a sufficiently "close parallel"[47] between the fictional and the real therapy session to make the plaintiff identifiable, and thus concluded that the novel was "of and concerning" the plaintiff. *Id.* at 75-76, 155 Cal. Rptr. at 37-38.

Once this hurdle was passed, a mechanical application of the actual malice test automatically led to a finding of

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he was pardoned. Bernstein's name was not used, but he alleged that the actor portraying him looked like him, and also identified nine other similarities between his life story and the drama. Finding him a public figure for purposes of this story, that the incidents were not private, and that he was not identified, the court denied liability.

[46] Use of personal experience is, of course, a standard literary tool. Few would suggest that Herman Melville, for example, could write *Moby-Dick* without any reliance on his own experiences as a young man on whaling ships. On the contrary, one commentator has noted that in many respects, the book was "very close to his earlier writings: thinly veiled autobiography used as a vehicle for personal reflection and topical information (in this case about the American whalers)." H. Melville, *Moby-Dick, or The Whale* xxi (C. Feidelson ed. 1964).

[47] The court apparently assumed that there was something inherently suspect in drawing upon life experience in the creation of fiction. Yet, authors often rely on real people as a basis for their fictional characters. Even a work as fantastic as James Joyce's *Ulysses* is premised, in part, on people Joyce knew. One commentator, for example, has discussed "many obvious parallels between the real woman [Nora Joyce, the author's wife] and the fictional creation in Joyce's text [Molly Bloom]." B. Maddox, *Nora* 199 (1988). *See generally* J. Joyce *Ulysses* (Shakespeare ed. 1922). Although Joyce's characters did not exactly mimic their real counterparts, the novelist "sought to draw a true picture of the lower middle class in a European city." *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 184 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934).

liability. Because the therapy session might be understood to describe the plaintiff, and because the defendant had known the "true facts" from actually attending sessions, 92 Cal. App. 3d at 72-73, 155 Cal. Rptr. at 35-36, any variation, including invented dialogues, was equated to knowing falsity.[48]

As *Bindrim* shows, one of the principal problems for fictionalization is the courts' readiness to permit a plaintiff to bring a claim based on the author's use of fictional figures. *Davis v. R.K.O. Radio Pictures, Inc.*, 191 F.2d 901 (8th Cir. 1951), involved a movie, *Fighting Father Dunne*, that sought to describe Father Dunne's charity home in St. Louis. One of the fictional characters in the movie was named Matthew Davis, which was also the name of an actual former resident of the home. The real Davis exhibited no antisocial behavior and did not violate the law; the fictional Davis, however, was a juvenile delinquent who committed larceny, burglary and, eventually, murder. Although the jury found for the defendant on Davis' defamation claim, the mere existence of similarities between the plaintiff and the fictional character was sufficient to require submission to the jury.

If an author can concoct enough dissimiliarities between the fictional and those real characters who might sue, however, the court may permit the work to escape liability. Thus, in *Aguilar v. Universal City Studios, Inc.*, 174 Cal. App. 3d 384, 219 Cal. Rptr. 891 (1985), the court

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[48] Certainly, Thomas Jefferson would have had grounds to sue Washington Irving under the analysis of *Bindrim*:

> Language cannot express the awful ire of William the Testy . . . his rage was too great for words, or rather the words were too great for him (being a very small man), and he was nearly choked by the misshapen, ninecornered Dutch oaths and epithets which crowded at once into his gullet. At length his words found vent, and for three days he kept up a constant discharge, anathematizing the Yankees . . . for a set of dieven, schobbejacken deugenieten, twistzoekeren [etc., etc.]. . . .

W. Irving, *Knickerbocker's History of New York*, Book IV, Ch. IV; *see also supra* n.24 (whether the work was of and concerning Jefferson).

closely scrutinized the similarities between the plaintiff, Bertha Aguilar, and the character "Bertha" in the movie *Zoot Suit* and found that, despite similar names and Ms. Aguilar's connections with the Zoot Suit gang, the differences between the real person and the fictional character were so great that no reasonable person could connect the two. Yet cases like *Davis* and *Aguilar*, where producers avoided liability because of the absence of identity between fictional characters and real plaintiffs, might have turned out differently if "real" people had been depicted.

Another line of cases focuses not on identification of the plaintiff, but rather on the existence of substantial accuracy as a basis for protecting docudrama. In *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250 (1970), Nathan Leopold brought an invasion of privacy action against the creators of a book and motion picture called *Compulsion*, inspired by his and Richard Loeb's kidnaping and murder of a fifteen-year-old boy. The characters in the creative works were not identified as either Leopold or Loeb, but the framework of their crimes was the outline of the story. Assuming that Leopold was sufficiently identifiable, the court nonetheless denied liability because the fictionalized portrayal was reasonably comparable to or conceivable from the facts of record. 259 N.E.2d at 256.

In *Davis v. Costa-Gavras*, 654 F.Supp. 653 (S.D.N.Y. 1987), the court also assumed identification of the plaintiff through a fictional character, yet refused to permit a defamation claim. Davis claimed to be defamed by the movie *Missing*, which portrayed the disappearance and apparent murder of an American, Charles Horman, during the 1973 military coup in Chile that toppled the Allende regime. *Id.* at 655. Ray Davis alleged that he was depicted as the American Ray Tower in the movie,[49]

[49] As the two *Davis* cases and *Aguilar* indicate, mere similarity of name is frequently sufficient to mount a defamation or invasion of privacy attack on a fictional work or docudrama. Yet, as the court noted in *Aguilar*, "[i]n a country of this size, containing all nationalities, it would be truly remarkable if an author used a name which was possessed by no one. Only the creator of 'Mork' from Ork would appear to be safe." *Aguilar*, 174 Cal. App. 3d at 391, 219 Cal. Rptr. at 894.

and that Tower, the fictional character, ordered or approved Horman's killing during the overthrow of the socialist government in Chile.

In granting summary judgment for the defendants, the court noted that the Tower character was a dramatic composite of the American presence in Chile—in essence, a symbolic figure. *Id.* at 658. Hence, Davis' defamation claim should have failed because the movie was not "of and concerning" him.[50] But recognizing the contradiction between literal application of the actual malice rule and the nature of docudramas, the court went on to dismiss the case:

> The cases on point demonstrate that the First Amendment protects such dramatizations and does not demand literal truth in every episode depicted; publishing a dramatization is not of itself evidence of actual malice.

Id.[51]

[50] The case illustrates another problem created by petitioner's proposed rule. If, as the court suggested in *Carson v. Allied News Co.*, 529 F.2d 206, 213 (7th Cir. 1976), "a journalist does not invent quotations and attribute them to actual persons," how does the director of *Missing* create his drama about the disappearance of Charles Horman during the Pinochet coup? The movie presented a compelling tale of the United States government's possible complicity in Horman's disappearance or at least indifference to Horman's situation. To do this, the director used a symbolic figure—in this case the Chief of the United States Mission to Chile. Yet, if the *Davis* court had adopted the *Bindrim* "of and concerning" analysis, the fact that there was only one Chief of the United States Mission in Chile at the time of the 1973 coup would establish that the statements by the fictional Tower in the docudrama were "of and concerning" the real Davis. And, if misquotations may result in libel liability, then the dramatist must avoid the use of any Tower character for fear of creating liability to Davis. In short, the story would not have been told.

[51] The Court of Appeals for the Sixth Circuit reached a similar result regarding a docudrama of the Scottsboro rape trial. In

B. Petitioner's Rule Would Further Confound Litigation Over Docudramas.

The contradictory and unpredictable results in these cases already require the creative writer and producer to walk a razor's edge between completely made-up characters and strict adherence to real events.[52] Under *Bindrim*, invented quotations may be sufficiently "false" to demonstrate falsity and actual malice, while simultaneously sufficiently "true" to be of and concerning a particular plaintiff, even though the author attempted to create a fictional work based on his or her own experiences.[53] Under cases such as *Leopold v. Levin*, 45 Ill. 2d 434, 259 N.E.2d 250, *supra*, and *Street v. NBC*, 645 F.2d 1227,

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Street v. NBC, 645 F.2d 1227, *supra*, the principal complainant and witness in the actual trial sued for libel and invasion of privacy for NBC's docudrama based on the events of the trial. The movie fictionalized language from the trial transcript, but the court found the allegedly defamatory portion "an accurate abridgement of the substance of the actual testimony." *Id.* at 1232. Although the court found that Street's portrayal was dafamatory, it held there was no liability because she had not demonstrated that the portrayal was false or that NBC recklessly disregarded the truth. Despite the altered quotations, this was not, the court concluded, "the 'big political lie,' the conscious or reckless falsehood." *Id.* at 1237.

[52] The issues of identification and substantial accuracy are further complicated by the question whether the portrayal is plausible. This Court, in *Hustler Magazine v. Falwell*, 485 U.S. at 55, held that the outrageousness of a fictional portrayal of a public figure was an insufficient basis for liability, if a reasonable person could not have believed it conveyed actual facts. Similarly, in *Pring v. Penthouse Int'l, Ltd.*, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983), the court determined that the allegedly defamatory story simply was not believable and therefore defamation liability could not attach. This split decision reversed a $14 million judgment entered by the district court. *See* Franklin, *supra* n.42, at 271-72.

[53] Obviously, despite petitioner's claim that he seeks only limited relief from this Court, *see* Brief for Petitioner at 26, the *Bindrim* court's imposition of liability based on fictionalized quotations in a work of fiction suggests that the danger may be far greater than petitioner admits.

supra, an author safely may identify a real person, but only if a court does not later disagree with the gist of the portrayal of that real person.

All of these cases, however, demonstrate a clash of disciplines between the fact-sensitive and lawyerly analysis of defamation law, and the imaginative and creative author's realm of drama. The former tests facts (which are presumably provable as true or false) in an adversary setting.[54] The latter creates scenarios of what could have been or what might have happened, and creatively expresses a more "true" view of human nature and experience.[55]

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[54] Even in this process, law has its inherent limitations. As Justime Holmes has noted, law is "a business with well understood limits, a body of dogma enclosed within definite lines." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

[55] *See, e.g.*, K. Kesey, *One Flew Over the Cuckoo's Nest* 8 (Penguin ed. 1976) ("But it's the truth even if it didn't happen."). Indeed, the truth as portrayed by a creative writer sometimes diverges from a lawyer's presentation of what is true. "The lawyer's truth is not Truth, but consistency or a consistent expediency." H. Thoreau, *Civil Disobedience*, in *Reform Papers* 87 (W. Glick ed. 1973). As one legal commentator has noted:

> This new aesthetic of the American Renaissance excludes the legal mind from literary enterprise. Hawthorne can describe the possibilities in a moonlit room, and Melville can tell Hawthorne that "truth is ever incoherent," but in the law reality is always otherwise. Practitioners with clients must deal in facts, certainty, affirmation, and assurance. They accept complexity and nuance only to solve problems. Reason is their tool; institutional continuity, their control. Of the emotional vortices and philosophical doubts that undermine the professional search for answers, they have little to say. Plays upon the ambiguous, the unique, and the bizarre—these possibilities excite the modern writer, and they also run counter to every lawyer's interests and goals. Since 1850 the best American writers have aimed for an original show of consciousness. Lawyers have throught ever more consciously of standards, norms, and rules.

R. Ferguson, *Law and Letters in American Culture* 271-72 (1984); *see also* Ayer, *The Very Idea of "Law and Literature,"* 85 Mich.

This case offers yet another peril to docudramas and other works that blend fact and fiction. An author's ability to create would be curtailed severely if a constitutional rule broadly mandating "journalistic excellence" through verbatim quotation is adopted by this Court. If misquotation is treated as knowing falsity, and if the lower courts fail to recognize that "misquotation" is inherent and necessary to docudramas and some works of fiction, then the rule advanced by petitioner would have consequences far beyond the confines of this case.

This broad reach of petitioner's proposed rule is fundamentally contrary to the principle that governmental regulation of the expression of ideas is strictly limited by the Constitution. As the Court stated in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974), it is "appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved." [56] Given the potential consequences of the proposed rule, Amici believe that the Court should decline petitioner's invitation to impose judicial supervision of journalistic ethics, not just on journalism but on all expressive speech.[57]

L. Rev. 895, 895 (1987) ("When all was said and done, law was one thing and literature another.").

[56] *See also Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984) (independent appellate scrutiny is necessary "to confine the perimeters of any unprotected category [of speech] within acceptably narrow limits"); *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968) (any restraint on First Amendment freedoms "must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate"); *NAACP v. Button*, 371 U.S. 415, 438 (1963) ("Broad prophylactic rules in the area of free expression are suspect.").

[57] Petitioner urges judicial intervention to combat the alleged woes of allegedly poor journalistic practices. But as Judge Kozinski noted and petitioner concedes, scholars and writers are in fact addressing the question whether alteration of a quotation constitutes good journalism. *Masson v. New Yorker Magazine, Inc.*, 895

III. A VERBATIM QUOTATION RULE WOULD UNDERMINE THIS COURT'S CAREFUL BALANCE BETWEEN FIRST AMENDMENT PROTECTION OF SPEECH—PARTICULARLY LITERACY SPEECH—AND THE STATES' INTEREST IN REDRESSING HARM TO REPUTATION.

The protection of reputation is the legitimate State interest that supports the law of libel. *Gertz*, 418 U.S. at 341. As the Court has observed, protection of reputation "'reflects no more than our basic concept of the essential dignity and worth of every human being.'" *Id.* (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

However, the inevitable tension between providing redress for reputational harm and protecting full freedom of expression has required this Court, since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), to "struggle[] . . . to define" the balance between protection of freedom of expression and the States' sanctions for defamatory falsehood. *Gertz*, 418 U.S. at 325; *see id.* at 342.

This balance could have been struck on a case-by-case basis, with this Court potentially scrutinizing every jury

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F.2d at 1558-62 (Kozinski, J., dissenting); Brief for Petitioner at 23 (noting that "the press has emphatically rejected" the practice).

Apparently dissatisfied with public debate, petitioner asserts that this "Court has a duty to discourage the publication of false quotes," Brief for Petitioner at 19, and that courts generally "have a duty to discourage the publication of . . . deliberately fabricated quotes." *Id.* at 28. But Amici believe that this case does not create any new "duty" for the courts. Not every societal problem mandates a judicial solution. Rather, this is an appropriate case for the Court to exercise judicial restraint as the Court and some of its members have observed in other areas of the law. *See, e.g., Spallone v. United States*, 110 S. Ct. 625, 635 (1990) ("'a court must exercise "[t]he least possible power adequate to the end proposed"'") (quoting *Shillitani v. United States*, 384 U.S. 364, 371 (1966) (quoting *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821)); *Florida v. Wells*, 110 S. Ct. 1632, 1640 (1990) (Stevens, J., concurring in the judgment) ("to reach out . . . unnecessarily to make new law in a case of this kind is unabashed judicial activism").

verdict in every libel case " 'to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate State interest in protecting the particular plaintiff who prevailed.' " *Gertz*, 418 U.S. at 343 (quoting *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 63 (1971) (Harlan, J., dissenting)). However, recognizing the need to provide guidance to litigants and to the courts below, the Court in *Gertz* determined that "we must lay down broad rules of general application." *Id.* at 343-44. As developed in *Gertz* and its progeny, these general rules differentiate among defamation plaintiffs and establish the constitutional standards that must be satisfied by libel plaintiffs, providing an "equitable boundary" between the competing concerns of the States and the First Amendment. *See Gertz*, 418 U.S. at 347-48.

The application of these rules has been evolutionary. For example, the meaning of a term such as actual malice "is not readily captured in 'one infallible definition.' " *Harte-Hanks Communicaitons, Inc. v. Connaughton*, 109 S. Ct. 2678, 2695 (1989) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968)). Also, the Court has carefully extended the plaintiff's constitutional burden in cases involving speech of public concern beyond proof of actual malice with convincing clarity to include proof of falsity. *Philadelphia Newspapers v. Hepps*, 475 U.S. at 768. Having established these constitutional guidelines, the Court has left their application to case-by-case determinations.[58] These subsequent adjudications have given substance to the otherwise somewhat "elusive constitutional standards." *Harte-Hanks*, 109 S. Ct. at 2695.

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[58] Beyond the constitutionally-required minimums, the content of some defamation elements is appropriately left to the States. *See, e.g., Gertz*, 418 U.S. at 347 ("We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.").

Now, however, petitioner would have the Court abandon its balanced development of those guidelines and impose an automatic rule for verbatim quotations that would presume both actual malice and loss of reputation from misquotation. Indeed, petitioner's proposed rule would effectively eradicate the constitutional burden of proof assigned to the defamation plaintiff by this Court. Rather than requiring the plaintiff to demonstrate that the substance of a statement was false and defamatory, and thus damaging to his or her reputation, the plaintiff would simply be put to a mechanical proof that the quotation was inaccurate. If so, petitioner argues, it would necessarily follow that the misquote must be false and harmful to reputation, and, further, that the misquote demonstrates actual malice because the writer knew what the speaker really said.

Careful application of this Court's defamation balance is particularly critical where the "square peg" of journalistic rules is forced into the "round hole" of literature and drama. The First Amendment protects the widest variety of expression of ideas, values, and tastes.[59]

Thus far, this Court has avoided injection of the adjudicative process into artistic creativity and the expression of ideas.[60] Rather, the Court has stated, "there is no such thing as a false idea. . . . [W]e depend for its correction not on the conscience of judges and juries, but

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[59] *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 157 (1946). "What is good literature, what has educational value, what is refined public information, what is good art, varies with individuals, as it does from one generation to another. . . . What seems to one to be trash may have for others fleeting or even enduring values." *Id.* at 157-58. "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

[60] Judicial restraint is sound policy in these circumstances. As Judge Posner has noted, "[t]he law is not one of the humanities, but a branch of government." Posner, *Law and Literature: A Relation Reargued*, 72 Va. L. Rev. 1351, 1392 (1986).

on the competition of other ideas." *Gertz*, 418 U.S. at 339-40.[61]

In docudramas and other dramatic literature, allegation that a quotation was created should not substitute for clear and convincing proof of the type of defamatory falsehood that the Court requires under the carefully balanced *Gertz* formulation—publication of a false statement that actually causes damage to the plaintiff's reputation. The inconsistent and confused results in the opinions of lower courts already illustrate the risks in mechanically drawing the boundaries between art and libel.[62] Misquotation alone should not secure a plaintiff's recovery for libel. If "the Court has a duty to discourage the publication of false quotes," Brief of Petitioner at 19, how will works of fiction or fictionalization fare when courts embrace this new "duty"? Unless First Amendment protection of expressive speech is to be eviscerated, fiction must not be equated with falsehood in the law of defamation, and misquotation should not be a substitute for the plaintiff's traditional evidentiary burdens.

In its defamation decisions, the Court has carefully balanced the fundamental principles of the First Amendment with the States' legitimate interest in redressing actual harm to reputation. Amici urge the Court to reiterate the teaching of its earlier cases and reject petitioner's suggested judicial "duty" to root out alleged misquotations from American journalism and literature. The significant dangers posed by petitioner's rule to expressive speech demonstrate that the Court should reject

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[61] *See also Milkovich v. Lorain Journal Co.*, 110 S. Ct. at 2705 (" '[T]he ultimate good desired is better reached by the free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.' ") (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

[62] As Professor Silver has cautioned, "our goal should be to expose the often subtle ways that mechanical application of the law may ignore the writer's craft and constrain artistic freedom." Silver, *supra* n.38, at 1098.

any mechanical surrogate as an alternative measure of defamation liability.

CONCLUSION

For the foregoing reasons the Amici respectfully urge this Court to affirm the judgment and decision of the Court of Appeals.

DATED this 17th day of December, 1990.

Respectfully submitted,

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APPENDIX

IDENTITIES OF INDIVIDUAL AMICI

Home Box Office, Inc., is a corporation that provides premium television programming by means of two subscription television services, HBO and Cinemax, to subscribing viewers throughout the United States. The HBO and Cinemax services telecast feature length motion pictures licensed to Home Box Office, Inc., as well as other television programs that are produced by or for Home Box Office, Inc. Currently, the HBO service is provided to 17.3 million subscribers and the Cinemax service is provided to 6.4 million subscribers.

Buena Vista Pictures Distribution, Inc., is a corporation and a wholly-owned subsidiary of The Walt Disney Company. Buena Vista distributes for theatrical release motion pictures, including docudramas, produced or financed by other companies including Walt Disney Pictures and Television, Touchstone Pictures, and Hollywood Pictures.

Columbia Pictures Entertainment, Inc., is a corporation and the owner of Columbia Pictures Industries, Inc., and Tri-Star Pictures, Inc., both of which finance, produce and distribute motion pictures, including docudramas, for theatrical release, as well as release to broadcast and subscription television and the video cassette market.

Orion Pictures Corporation, Paramount Pictures Corporation, and Twentieth Century Fox Film Corporation are each corporations that are engaged in the financing, production, and distribution of motion pictures, including docudramas, for theatrical release, as well as release to broadcast and subscription television and the video cassette market. Each company also participates in the financing, production, and distribution of television programming.